No. 50297-6-II

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

BRITT EASTERLY,

Appellant,

ELZY EDWARDS and CLIFFORD EVELYN,

Plaintiffs,

v.

CLARK COUNTY,

Respondent.

BRIEF OF RESPONDENT

Mitchell J. Cogen, WSBA No. 46364
Bullard Law
200 SW Market Street, Suite 1900
Portland, OR 97201
503-248-1134/Telephone
503-224-8851/Facsimile

Attorneys for Respondent
Clark County

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

In December 2009, Appellant Britt Easterly ("Easterly") brought three claims against Respondent Clark County ("County") alleging race discrimination in violation of the WLAD, intentional infliction of emotional distress, and negligence. Of those three claims, only one made it to a jury.[1] Easterly sought backpay and emotional distress damages on his WLAD claim. Following an 8-day trial, Easterly was awarded no backpay but the jury awarded $500,000 in emotional distress damages.

Following entry of judgment, Thomas Boothe ("Boothe"), Easterly's attorney, moved the trial court for an order awarding attorney fees and costs. Boothe sought close to $1,000,000 in attorney, paralegal and "other professional" fees, costs and expenses. In doing so, Boothe improperly sought fees and costs related to the cases of co-plaintiffs Evelyn and Edwards, sought fees and a "success bonus" for a trial videographer, and sought an unreasonable hourly rate for his attorney fees.

The trial court analyzed the extensive submissions of the parties

---

[1] Easterly erroneously directs this court to its opinion in *Easterly et al v. Clark County*, 194 Wn. App. 1029, 2016 WL 3351562, *review denied*, 187 Wn. 2d 1010 (2017) for an exposition of the facts in Easterly's case. The cited opinion addresses the appeals of the summary judgment dismissals of the claims of Clifford Evelyn and Elzy Edwards, Easterly's co-plaintiffs, and does not address Easterly's claim. *See Id*. at fn. 2.

and properly exercised its discretion in calculating the lodestar, determining that a multiplier was not warranted, and awarding reasonable fees and costs related only to Easterly's case. The trial court set Boothe's reasonable hourly rate at $400 per hour---the highest rate ever awarded Boothe.

II. STATEMENT OF THE CASE

Following dismissal of his tort claims, Easterly's WLAD racially hostile work environment claim went to trial before a jury in August 2016. The jury found for Easterly but awarded him only emotional distress damages. Easterly subsequently moved for attorney fees and costs. CP 214-234; 262-264.

Easterly sought payment for vastly exaggerated hours. CP 410-428. Easterly failed to adequately segregate fees and costs related to the claims of Evelyn and Edwards as well as related to claims on which Easterly did not prevail. *Id*. Easterly further improperly sought fees for clerical and courier work as well as unnecessary and wasteful time spent. *Id*. The trial court analyzed the County's detailed objections, CP 350-399, and deducted or retained hours as appropriate. CP 501. Easterly does not appeal the trial court's reduction of the number of hours sought.

Easterly sought a fee of $475 per hour for Boothe. CP 214-234. Easterly submitted affidavits from plaintiffs' bar colleagues in support and

the County submitted an affidavit from a Washington attorney fees expert, David Burkett, in response. CP 3, 10, 14, 28, 235, 266, 434, 437, 439, 492. Many of Easterly's affidavits, including Conde (CP3), Colven (CP 434), Good (CP 437), and Fells (CP 439), fail to reflect any review of or knowledge about the Easterly case and are unhelpful. Others testify based on rates from other localities and are similarly unhelpful. CP 235 (Mann). Price (CP 10) and Fells (CP 439) are, like Boothe, both 30-plus year plaintiffs' lawyers practicing in Vancouver whose hourly rates are $350 and $375 respectively. Burkett testified that a reasonable hourly rate for Boothe in this matter is $375 per hour. CP 272. The trial court awarded Boothe $400 per hour as part of the lodestar---the highest amount he has been awarded—finding it at the higher end for legal work of a similar character in the locality. CP 500-503, 223.

Easterly also sought a multiplier to the lodestar for quality of work and the contingent nature of the representation. CP 226-232. Easterly failed to disclose any contingent fee agreement that may exist. CP 408, 294. The trial court denied any multiplier to the lodestar, reasoning that the high, current hourly rate applied to all hours over the course of the litigation adequately "takes into account the skill and experience of the legal team and the difficulty and novelty of the factual and legal issues involved." CP 501.

Easterly further sought to include the time of Kesten Media, trial videographers, as part of the lodestar. CP 225. Easterly failed to establish that the video technicians were legal professionals and the trial court found that "[t]echnical support and courtroom assistance with video is not attorney or paralegal time and is not recoverable at a reasonable hourly rate." CP 501. The trial court allowed recovery of $13,000 for trial video support as a cost based on Kesten Media's invoices. CP 501, 523-527, 553. Easterly moved for reconsideration and the trial court denied the motion. CP 635-640, 642-643. Easterly appeals the $400 per hour rate awarded, the trial court's denial of a multiplier and the trial court's award regarding Kesten Media. CP 555-560, 645-648.

III. ARGUMENT

A. The Trial Court Properly Exercised Its Discretion in Calculating the Lodestar.

The WLAD entitles prevailing plaintiffs to "reasonable attorneys' fees" and trial courts must independently determine whether a fee is reasonable. RCW 49.60.030(2); *Steele v. Lundgren,* 96 Wn. App. 773, 780, 982 P.2d 619, 623 (1999). To make such independent determination, the trial court begins by calculating a lodestar figure. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 58, 675 P.2d 193 (1983). The lodestar method of calculating reasonable attorney fees is "the default principle for fee calculation in Washington." *Brand v. Dept of Lab. &*

Ind., 139 Wn.2d 659, 676, 989 P.2d 1111 (1999), citing *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998).

To calculate a lodestar amount, a court multiplies the number of hours reasonably expended by the reasonable hourly rate. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993). The lodestar methodology can be supplemented by an analysis of the factors set forth in RPC 1.5(a), which provide guidance as to the reasonableness of a fee. *Allard v. First Interstate Bank of Wash.*, 112 Wash.2d 145, 768 P.2d 998, 773 P.2d 420 (1989). RPC 1.5(a) provides that factors to be considered in determining the reasonableness of a fee include the following:

> (1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) The fee customarily charged in the locality for similar legal services;
>
> (4) The amount involved in the matter on which legal services are rendered and the results obtained;
>
> (5) The time limitations imposed by the client or by the circumstances;
>
> (6) The nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, and ability of the lawyer or

lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. A trial court abuses its discretion when it exercises discretion on untenable grounds or for untenable reasons. *Ewing v. Glogowski*, 198 Wn. App. 515, 521, 394 P.3d 418, 422 (2017), citing *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Accordingly, the scope of appellate review of a fee award is narrow. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn. 2d 364, 376, 798 P.2d 799, 806 (1990).

Here, the trial court properly exercised its discretion in determining the lodestar.

1. The applicable hourly rate was properly determined by the trial court and the trial court properly explained its reasoning based on the evidence.

The trial court in the first instance must determine whether the hourly rate sought by Boothe is reasonable. A reasonable hourly rate reflects the market value of the attorney's services and the party seeking fees bears the burden of proving the reasonableness of the rate. *Fetzer, supra*, 122 Wn.2d at 149-50; *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933 (1983). Absent such proof, the court may reduce the rate

sought. *Id*. Easterly contends that the trial court erred in determining that a reasonable hourly rate for Boothe's services was $400 per hour as opposed to the $475 per hour he sought. There was no error since there is substantial evidence supporting the trial court's determination upon which it relied and described.

a. Boothe's hourly rate was previously set by the trial court.

Boothe directs the Court to a 2010 case in state court in Oregon where Boothe was awarded a rate of $400 per hour. Br. 3. Curiously, Boothe fails to tell this Court that also in 2010 following a jury verdict on a WLAD claim, Division II affirmed this trial court's determination that $280 per hour was a reasonable hourly rate for Boothe's services. CP 269; 405. The determination of a reasonable hourly rate for Boothe from the same trial court following a similar case logically carries more weight and import than the determination of a court in another state.[2] According to

[2] The fee determination by the Clackamas County Circuit Court in Oregon fails to assist Boothe since it facially reflects a fee determination in a different locality which has no bearing on the reasonableness of a fee in Clark County. RPC 1.5(a)(3) (factors affecting reasonableness of fee include "[t]he fee customarily charged in the locality for similar legal services.").

the Bureau of Labor Statistics, a $280 hourly rate in 2010 would be equivalent to a $310.40 hourly rate in 2017.[3] CP 289.

b. The affidavit testimony supports the trial court's determination.

Boothe further argues that the trial court erred by failing to accept the declarations of other attorneys that $475 per hour was a reasonable rate for Boothe. However, it is well-settled in Washington that in determining the reasonableness of rates, courts must independently assess the rate sought and should not simply accept affidavits submitted from counsel. *Mahler, supra,* 135 Wn.2d at 434; *West v. Port of Olympia*, 146 Wn. App 108, 123, 192 P.3d 926, 934 (2008) (court is "not required to accept unquestioningly fee affidavits from counsel.").

The trial court also had before it the testimony of the County's attorney fees expert who testified that based on his extensive experience and expertise regarding attorney fees in Washington, his review of the case materials, and a sampling of Clark County plaintiff's employment

[3] Easterly argued to the trial court that the Oregon State Bar 2012 Economic Survey supported his request for a $475 hourly rate. CP 223-24. Notwithstanding the challenges posed by the differing localities, that survey when properly applied reveals that $375 is a reasonable hourly rate for Boothe. CP 405-407.

lawyers, $375 per hour was a reasonable rate for Boothe. CP 266-277.[4] Of Easterly's declarations, attorneys Price (CP 10) and Fells (CP 439) are the most comparable to Boothe. Each is a plaintiffs' attorney in practice more than 30 years practicing in Vancouver, WA. Price's hourly rate is $350 and Fells' hourly rate is $375. *Id*.. The trial court's award of $400 per hour for Boothe is reasonable and factors in employment law specialization.

c. Easterly's attorney association argument is not reviewable. Even if it were, it fails to serve as a valid basis for fee determination.

Boothe also argues absent any supporting authority that because he is an employment lawyer, the typical rules regarding reasonable attorney fees do not apply to him. Rather, Boothe contends that employment law is a "specialized subset of litigation" that is state-wide in scope such that "rates charged by employment lawyers are specialty-based, not geographically based." Br. 10. In support, Boothe notes the existence of the Washington Employment Lawyers Association (WELA). *Id*. Boothe's argument falls flat.

---

[4] Easterly inexplicably and inaccurately alleges that the County offered no expert testimony contrary to the testimony of the self-interested plaintiff's lawyers proffered by Boothe.

As an initial matter, Boothe failed to raise the "specialty-based, not geographically based" argument before the trial court. Thus, this argument has not been preserved on appeal. *Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007). Further, it is axiomatic that the fee customarily charged in the locality for similar services is a factor courts properly apply in determining reasonable hourly rates. RPC 1.5(a)(3); *See generally*, Philip A. Talmadge, Thomas M. Fitzpatrick, *The Lodestar Method for Calculating a Reasonable Fee in Washington*, 52 Gonz. L. Rev. 1, 7 (2016/17). Moreover, Easterly confirms that the venue of the case is a factor "legitimately before a trial court in assessing the reasonableness of the hourly rate." Br. 9. Despite well-settled law, Boothe argues that locality should play no role in determining his hourly rate. Such argument should be given little weight.

Boothe argues that since Washington employment lawyers have chosen to create an association (WELA) that accepts members from around the state, this Court should establish new law that permits employment lawyers' hourly rates to be set at the highest rate awardable anywhere in the state. Boothe's WELA argument is facially hollow since application of such reasoning would lead to an absurd, unworkable result.

Boothe argues that the fees charged for "similar services" referenced in RPC 1.5(a)(3) means fees charged in specialized areas of

practice and since WELA is a state-wide association, fees for employment lawyers must be established state-wide rather than by locality. Br. 9-10. A fatal flaw in this argument is that numerous other state-wide legal associations exist, including the Washington State Association for Justice (WSAJ) (*fka* Washington Trial Lawyers Association). The WSAJ is a state-wide association of "Washington's top law firms, attorneys, legal professionals and consumer groups to protect the legal rights of wronged consumers, injured citizens, patients and workers."[5] Other state-wide legal professional organizations include the Washington Society of Health Care Attorneys[6], Washington Lawyers for Sustainability[7], and Washington Lawyers for the Arts[8]. Applying the reasoning sought by Boothe, all attorneys who are eligible to join any of these associations would be considered to practice in a "specialized area of practice." Given the breadth of the WSAJ in particular, Boothe's proposed construct would enable virtually all plaintiffs' attorneys in Washington to seek the highest

---

[5] https://www.washingtonjustice.org/ (last visited July 20, 2017).

[6] http://wssha.org/ (last visited July 20, 2017).

[7] http://www.washingtonlawyersforsustainability.org/ (last visited July 20, 2017).

[8] http://www.thewla.org/ (last visited July 20, 2017).

fees charged by other attorneys in the state, rendering RPC 1.5(a)(3) and related case law a nullity. *See e.g., West, supra*, 146 Wn. App at 122-123 (affirming trial court's restriction on attorney fees to those charged in the Olympia area).

Further, the proposed construct would unnecessarily force courts to grapple with entirely new questions in analyzing fee petitions, such as whether reasonable fees differ for association members versus non-members. [9] And what becomes of the plaintiffs' lawyer who takes a case that somehow falls between the cracks of the scopes of the various associations? Will a two-tiered system for fee determination be required? And what about the attorney who belongs to or is eligible for more than one association, such as employment lawyer who belongs to WELA and also WSAJ? Can such attorney at his discretion look at both organizations' hourly rates state-wide and choose the higher one? Such an approach is plainly untenable.

d. There is no evidence of a rate customarily charged by Boothe for hourly work.

Boothe seeks to support his sought-after rate of $475 per hour by claiming that this is "the rate he customarily charged for hourly work

[9] Interestingly, fewer than half of the plaintiff-side attorneys who signed declarations in support of Easterly's fee petition are WELA members.

where payment is regular and assured." Br. 6. Boothe bears the burden of proving the reasonableness of the rate sought. *Fetzer, supra*, 122 Wn. 2d at 149-50. However, there is no evidence that Boothe "customarily charged" $475 for hourly work, nor any evidence that Boothe charged that rate for similar work as performed for Easterly.

To the contrary, the only evidence in this regard is the testimony of Jon L. Woodson and of Boothe himself. CP 18, 43. Woodson testified that he is the owner of DJ Holdings, Inc., a company for which Boothe is the Registered Agent, and that Boothe in essence served as the Woodson family lawyer representing "me, my family and my companies for more than thirty years in both litigation and transactional work." CP 18; CP 295. While it is clear that Boothe has a long personal relationship with Woodson and his family, the record is devoid of any evidence that Boothe's services for DJ Holdings or the Woodson family were at all similar to those he provided to Easterly. Further, Woodson fails to establish that he actually paid Boothe an hourly rate of $475 at any point, nor does he provide any details about on the nature of the "litigation and transactional work" that Boothe performed.

Boothe's testimony fails to establish that he actually performed, billed, or collected on any work for any client at his claimed $475 per hour rate at any point in 2016. Indeed, he concedes that he has a primarily

contingent practice. CP 43. Such thin evidence fails to establish that Boothe "customarily" bills at an hourly rate of $475.

e. The trial court adequately explained its reasoning for reducing Boothe's hourly rate.

Easterly claims that the trial court reduced Boothe's hourly rate without explanation. Br. 9. However, based on the evidence before it, the trial court specifically found that "[t]he hourly rate used is at the higher end for legal work of a similar character in this area, and takes into account the skill and experience of the legal team and the difficulty and novelty of the factual and legal issues involved." CP 501. Thus, the trial court properly explained its reasoning in reducing the hourly rate sought.

B. The Trial Court Properly Determined that Costs Related to Kesten Media's Video Services Were Expenses Not Part of the Lodestar and Properly Awarded Such Costs.

Easterly argues that Kesten Media served as "trial consultants" whose activities meet the definition of legal assistants and whose fees should be recoverable as part of the lodestar. Br. 11. The trial court found that Kesten's "technical support and courtroom assistance with video is not attorney or paralegal time and is not recoverable at a reasonable hourly rate." CP 501. The trial court instead found that if properly documented, the amount actually expended by Boothe for Kesten's services, if

reasonable, may be recovered as a cost.[10] *Id*. The trial court did not err in its analysis or award regarding Kesten Media.

1. Kesten Media did not serve as legal assistants and its costs were properly excluded from the lodestar.

"[I]t is the trial judge who watches the case unfold and who is in the best position to determine which hours should be included in the lodestar calculation." *Bright v. Frank Russell Investments,* 191 Wn App. 73, 84 (2015). Thus, great deference should be afforded to the trial court's determination as to whether non-lawyer services rise to the level of legal assistant services includable in the lodestar. The trial judge observed Kesten Media's services firsthand during each day of trial and correctly determined that the services were not legal in nature and that Kesten staff were not legal assistants. CP 501.

Absher Const. Co. v. Kent Sch. Dist. No. 415, 79 Wn. App. 841, 845, 917 P.2d 1086, 1088 (1995), instructs that the criteria relevant to the determination whether a non-lawyer is a "legal assistant" are:

---

[10] Boothe failed to submit any support for Kesten Media's costs with his motion. However, the trial court reserved the matter and permitted Boothe to present supplemental evidence of the costs of Kesten Media's services. CP 502, 509-554. Boothe failed to appear at the hearing on his supplemental cost petition. However, the trial court awarded Boothe $13,000—the full amount reflected by Kesten Media's invoices submitted by Boothe. CP 523-527.

> (1) the services performed by the non-lawyer personnel must be legal in nature; (2) the performance of these services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical; (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and (6) the amount charged must reflect reasonable community standards for charges by that category of personnel. *Id*.

Neither Michael Kesten nor Emily Smith Harrington are legal assistants pursuant to *Absher*.

a. Michael Kesten did not serve as a legal assistant.

Boothe argues that Michael Kesten met the definition of a legal assistant and his staff hours should have been included in the lodestar fee. However, Kesten's testimony fails to establish that he has the requisite education, training, or work experience to perform substantive legal work. Rather, Kesten testifies that he has a degree in journalism and background in television news and communications. CP 33. Kesten attests to no personal history that qualifies him as a legal assistant under *Absher*.

Boothe cites *Bender v. Los Angeles*, 217 Cal. App. 4th 968, 990-991, 159 Cal. Rptr. 3d 204 (2013) in support. Br. 11-15. In reality, the *Bender* court found just the opposite. In *Bender*, plaintiff sought to recover

trial technology consulting costs for services remarkably similar to those here. Plaintiff sought costs for "trial video computer, PowerPoint presentation and videotaped deposition synchronizing" for nine days of trial. As here, plaintiff in *Bender* used a PowerPoint presentation in closing argument that consisted of a detailed summary of trial testimony, documents and other evidence and the costs included charges for creating designated excerpts from deposition transcripts and video, converting exhibits to computer formats, and design and production of electronic presentations. *Id*. However, the trial technology expenses in *Bender* were decided on appeal of denial of a motion to tax costs. *Id*. Plaintiff there did not attempt to recover such costs as part of the lodestar and *Bender* is inapposite.[11]

BD v. DeBuono, 177 F. Supp. 2d 201, 245 (S.D.N.Y. 2001), also cited by Easterly is similarly unhelpful since the nature of the services provided by the trial consultants in *BD* was vastly different than Kesten's.

[11] In fact, *Bender* bolsters the trial court's decision since the trial court properly found that Kesten's "services, if reasonable, may be recovered as a cost, if these expenditures are properly documented." CP 501. Boothe failed to submit any support for Kesten Media's costs with his motion. However, the trial court reserved the matter concerning these costs and permitted Boothe to present supplemental evidence of the costs of Kesten Media's services. CP 502, 509-554. The trial court awarded Boothe $13,000—the full amount reflected by Kesten Media's invoices submitted by Boothe. CP 523-527.

In *BD*, plaintiffs sought "expert fees" for "trial preparation consultant" services that included mock trials, assisting plaintiffs' attorneys with pretrial preparation, as well as providing technological assistance and help picking a jury at trial. *Id*. The consultants in *BD* were "litigation support specialists" trained in various aspects of courtroom practice and procedure who were consulted by litigators throughout a case to hone their trial skills in the context of a particular case. *Id*. In that specific context, the district court found that "litigation consultants, *used in the manner that plaintiffs' counsel used them here*, are the equivalent of additional attorneys or legal para-professionals." *Id*. (emphasis added). The district court noted that "[i]f plaintiffs' counsel had organized mock trials themselves, or done their own jury consulting research, the hourly rates they charged for those services would be reimbursable as part of an attorneys' fee award." *Id*.

The services provided by Kesten Media were markedly different. Kesten did not prepare mock trials, assist with pretrial preparation, or help Boothe hone his trial skills. The only substantive legal work that Kesten testified he provided was "assist[ing] Mr. Boothe in venire person assessment during voir dire." CP 34, 517. All other entries by Kesten reflect purely administrative and technical support functions, such as "processing deposition videos, organizing trial materials," "quality check video clips," and "playing clips, displaying exhibits, taking notes,

reviewing materials." CP 515-519. Moreover, Boothe had two other paralegals at trial helping him with voir dire, minimizing the likelihood that Kesten performed any true legal services. CP 41.

b. The record lacks any evidence that Emily Smith Harrington served as a legal assistant.

Boothe also seeks to include in the lodestar the time spent by Emily Smith Harrington, a Kesten employee, preparing video excerpts. CP 215. As *Absher* instructs, Boothe bears the burden *inter alia* of specifying facts in his request in sufficient detail to demonstrate that Harrington is qualified by virtue of education, training, or work experience to perform substantive legal work; the services performed by Harrington were legal in nature and were supervised by an attorney; the nature of the services performed by Harrington must be specified in the request for fees in order to allow this Court to determine that the services performed were legal rather than clerical; and the amount charged must reflect reasonable community standards for charges by that category of personnel. *Absher, supra*, 79 Wn. App. at 845. Boothe failed to satisfy any of these required factors with respect to Harrington.

There is no evidence demonstrating that Harrington is qualified by education, training, or work experience to perform substantive legal work. In fact, there is no evidence at all regarding Harrington's education,

training or work experience. Harrington did not submit a declaration or affidavit attesting to her background. To the contrary, the only evidence about Harrington's role in Easterly's case is a brief reference to Harrington in Kesten's declaration and billing detail submitted by Harrington. CP 33; 220-222.

Similarly, there is no evidence that the services performed by Harrington were legal in nature, no evidence that Harrington was supervised by an attorney, and no evidence that the amount charged by Harrington reflected reasonable community standards for such services. The entirety of Kesten's testimony about Harrington's services is that "Ms. Harrington synchronized deposition excerpts for video presentation." CP 34. Harrington's billing detail reflects that she performed no more than routine administrative tasks, often related to witnesses who had nothing to do with Easterly's case. CP 220-222; 410-418.

No evidence supports that Harrington was qualified to or performed services equivalent to a legal assistant and the trial court properly excluded her time and hours from the lodestar.

2. Kesten Media's invoiced charges were recoverable as costs and the trial court properly awarded those costs.

The trial court properly found that Kesten Media's services were not attorney, paralegal, or legal assistant time recoverable at an hourly

rate. CP 501. Rather, the trial court found these expenses recoverable as costs if properly documented. The trial court reserved the matter for the taking of additional evidence since Boothe failed to submit any support for Kesten Media's costs with his motion. CP 502; 509-554. Easterly filed a "Supplement Re: Kesten Media" wherein Boothe testified that Kesten's base rate is $65 per hour and Smith's base rate is $50 per hour, with an alleged agreement between Boothe and Kesten that Kesten could receive a "success bonus" that would double Kesten and Smith's base rates. CP 504-507; 510. Boothe submitted a spreadsheet with a column labeled "Amount Invoiced" with a total of $16,179.25 and a similar amount reflecting the "success bonus" labeled "Deferred Amount Pending Court Approval." CP 514.

However, Kesten Media's actual invoices differ. CP 523-527. The five invoices reflect a total of $13,000 billed to Boothe, $10,000 of which was previously paid. RCW 49.60.030(2) provides that "costs of suit" are recoverable by a prevailing plaintiff in a WLAD action. Such costs are defined *inter alia* as "incurred costs that are reasonable and necessary in the preparation and trial of the case." Since the "success bonus" is not an incurred cost, the trial court properly rejected Boothe's attempt to shift this to the County. The trial court properly awarded Boothe $13,000 in costs

for Kesten Media's services—the full amount supported by invoices in the record. CP 523-527.

C. The Trial Court Correctly Determined That No Fee Multiplier Was Warranted.

Boothe contends that the trial court erred because it did not award a fee multiplier. Boothe argues that the contingent nature of his representation of Easterly, the quality of the work performed, and the "protracted and bitter nature of the litigation" warrant a multiplier. Br. 7. Boothe is incorrect on all counts.

1. The quality of Boothe's representation does not warrant a multiplier.

Boothe argues that a quality multiplier was merited because "this was not a garden-variety employment case. It was hard fought. The case was tried over 8 days. It required a trip to the Court of Appeals. The trial court was oblivious to these realities." Br. 21. In actuality, the trial court was precisely and keenly aware of the realities of this case, including the truth about what transpired with Easterly's case.

Quality of work multipliers or other adjustments are reserved for "rare" occasions in Washington and the lodestar fee is presumed to adequately compensate an attorney. *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 355–58, 279 P.3d 972, 988–89 (2012); *Chuong Van Pham,* 159 Wn.2d at 542, 151 P.3d 976; *Sanders v. State,* 169 Wn.2d 827, 869, 240

P.3d 120 (2010). As a general rule, the quality of work performed will not justify an enhancement because "in virtually every case the quality of the work will be reflected in the reasonable hourly rate." *Berryman v. Metcalf*, 177 Wn. App. 644, 667, 312 P.3d 745, 758 (2013); *Bowers*, 100 Wn. 2d at 599, 675 P.2d 193 (1983). The trial court correctly found that an increase above the lodestar was not warranted because "[t]he hourly rate used is at the higher end for legal work of a similar character in the area, and takes into account the skill and experience of the legal team and the difficulty and novelty of the factual and legal issues involved." CP 501.

The grounds set forth by Boothe in support of a multiplier are inaccurate and unpersuasive. First, Easterly's case was, in fact, the epitome of a garden-variety employment case. Based on a handful of events that occurred during his work tenure, Easterly alleged that *in toto* these events constituted a racially hostile work environment. Cases of this precise nature fill court dockets across the state and country and there was nothing extraordinary or unusual about Easterly's case.

In *Chuong Van Pham*, the Washington Supreme Court affirmed a multiplier in an employment case on the grounds that the case was "high risk" because the plaintiffs had difficultly articulating the nature of their discrimination claims. 159 Wn.2d at 722-23, 151 P.3d 827. Unlike, *Choung Van Pham*, Easterly had no difficulty articulating the nature of his

claims. To the contrary, Easterly specified six things that had occurred over the course of his 10-year employment that he believed were because of his race. There were no novel problems of proof as in *Choung Van Pham.*[12]

Rather, Easterly's case more closely parallels *Fiore, supra.* In *Fiore,* Division I reversed a .25 multiplier awarded to plaintiff's counsel by the trial court. Even though the case was a "test case" with national implications, the court of appeals found the case was a "straightforward wage and hour case…made complicated only by the amount of time and skill that it required—a consideration already accounted for in the lodestar amount." *Id.*, citing *Chuong Van Pham,* 159 Wn. 2d at 541, 151 P.3d 976. ("The difficulty of establishing the merits of the case is ... already reflected in the lodestar amount because the more difficult a case is, the more hours an attorney will have to prepare and the more skilled an attorney will have to be to succeed."). Similarly, Easterly's case was a straightforward WLAD hostile work environment case, made somewhat

[12] Boothe may argue that his use of excerpts of deposition videos of defense witnesses rather than live testimony established a novel type of proof sufficient to warrant a quality multiplier. However, unlike in *Chuong Van Pham*, there was nothing about Easterly's case that required Boothe to do so. Rather, it was his choice to use video deposition excerpts at trial, as occurs in trial courts around the state every day.

more complicated only by Boothe's decision to bring Easterly's case together with Evelyn's and Edwards'.

Boothe contends that *Miller v. Kenny*, 180 Wn. App. 772, 325 P. 3d 278 (2014) supports a multiplier here. *Miller* is distinguishable. Division I noted the apt description by the trial court in *Miller* that the case was "one of the most complex and difficult civil cases ever undertaken in Skagit County. The case took nearly eight years of litigation, a 14-day bifurcated jury trial, two previous trips to the Court of Appeals, 70,000 pages of documents, 95 motions, a $25,000 discovery sanction imposed, and 669 entries in the trial court docket. This case was tough." *Id*. at 825-26. Certainly, nothing remotely similar can be said about Easterly's case. Rather, as the trial court was well aware, the vast majority of contentiousness and motion practice in this multi-plaintiff case involved the cases of Evelyn and Edwards, not Easterly's.

Moreover, Boothe misrepresents the record in arguing that a quality multiplier is warranted because Easterly's case "required a trip to the Court of Appeals." Br. 21. Although co-plaintiffs Evelyn and Edwards appealed the summary judgment dismissals of their claims, Easterly never appealed any decisions in his case until now.

A quality adjustment to the lodestar should only be awarded on an extremely limited basis and is appropriate only when "work performed by

plaintiffs' attorneys was significantly better than could be expected from attorneys who commanded the hourly rates used to calculate the lodestar." *Bowers, supra,* 100 Wn. 2d at 601 (reversing quality adjustment to lodestar where no evidence suggested work performed by plaintiffs' attorneys was significantly better than other attorneys who commanded same hourly rate). The trial court awarded Boothe a lodestar rate of $400 per hour—a very high rate for the locality and the highest rate ever awarded Boothe by a court. CP 223, 273. The record is devoid of evidence that Boothe performed significantly better than other attorneys who bill at $400 per hour and this is not one of the rare circumstances where a quality multiplier is warranted.

2. The contingent nature of the representation does not warrant a multiplier.

Boothe also argues that the contingent nature of his representation of Easterly mandates that a multiplier be awarded because "the risk was real at the outset of the litigation that Easterly's counsel would face an aggressive opponent in the County and might never get paid." Br. 22. The law is contrary to Boothe's position and the trial court properly exercised its discretion in denying a contingency multiplier.

a. Contingency multipliers are disfavored.

As a general rule, courts do not have an obligation to protect attorneys who have taken the risk that a contingent fee case will end in a

defense verdict with no reimbursement for advanced costs. *Berryman v. Metcalf*, 177 Wn. App. 644, 676, 312 P.3d 745, 763 (2013). Many plaintiffs have brought risky contingent-fee cases under remedial statutes instilled with public interest, have endured years of litigation and gone through lengthy and complex trials against aggressive and well-funded opponents, and yet their attorneys have not been granted multipliers. *Id*. at 675.

Although permissible in rare circumstances, contingency multipliers are disfavored. The United States Supreme Court has cautioned that severe inequities are inherent in this approach.[13] For instance, the Court has held that awarding a multiplier on the basis of contingency risk improperly forces losing defendants to compensate plaintiff's lawyers for not prevailing against defendants in other cases. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 724–25, 107 S. Ct. 3078, 3086, 97 L. Ed. 2d 585 (1987). The Court opined:

> [Contingency risk enhancement] is not consistent with Congress' decision to adopt the rule that only prevailing parties are entitled to fees. If risk multipliers or enhancement are viewed as no more than

[13] Washington courts frequently rely on federal authority when interpreting the WLAD on attorney fees issues. *Blair v. Wash. State Univ.*, 108 Wn. 2d 558, 570, 740 P.2d 1379 (1987).

> compensating attorneys for their willingness to take the risk of loss and of nonpayment, we are nevertheless not at all sure that Congress intended that fees be denied when a plaintiff loses, but authorized payment for assuming the risk of an uncompensated loss. *Id*.

In rejecting contingency risk as an independent basis for lodestar enhancement in federal cases, the Court noted that granting a multiplier for risk of loss:

> [p]enalizes the defendants who have the strongest case; and in theory, at least, would authorize the highest fees in cases least likely to be won and hence encourage the bringing of more risky cases, especially by lawyers whose time is not fully occupied with other work. Because it is difficult ever to be completely sure that a case will be won, enhancing fees for the assumption of the risk of nonpayment would justify some degree of enhancement in almost every case.[14] *Id*.

b. The trial court properly addressed any contingent risk by awarding current rather than historic rates.

In extraordinary circumstances, *Bowers* permits contingency adjustment to the lodestar amount. But "the contingency adjustment is designed **solely** to compensate for the possibility…that the litigation would be unsuccessful and that no fee would be obtained." *Bowers,* 100

[14] Contingency multipliers are also disfavored because they "likely duplicate in substantial part factors already subsumed in the lodestar." *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (difficulty of establishing merits of the case already reflected in lodestar because more difficult case requires more attorney preparation time and skill; contingency enhancement would result in double payment).

Wn.2d at 598–99, 675 P.2d 193 (quoting *Copeland v. Marshall,* 641 F.2d 880, 893 (D.C.Cir.1980) (emphasis added). "[T]o the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees, no further adjustment duplicating that allowance should be made." *Id*.

Here, *Bowers* mandates that no further contingency adjustment should be made because the trial court already addressed and compensated for that risk by awarding Boothe a lodestar figure adjusted to reflect current rather than historical rates. CP 501. *Steele v. Lundgren,* 96 Wn. App. 773, 785–86, 982 P.2d 619, 626 (1999) (adjusting historic rates to current rates in civil rights and other public interest cases compensates for "delay in payment or risk of losing and not getting paid at all"); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn. 2d 364, 376, 798 P.2d 799, 806 (1990). As the *Fisher* court made clear, "[t]he reasoning behind using current rates or adjusting historic rates to account for inflation is to compensate the attorney for delay in payment or the risk of losing and not getting paid at all." *Id*. "The risk of losing and not getting paid at all" is precisely the contingency risk at issue here. Since the lodestar fee awarded by the trial court was based on current rates and thus "comprehends an allowance for the contingent nature of the availability of fees," the trial court properly declined to duplicate an allowance for that same risk.

c. No contingency multiplier should be awarded because Boothe has failed to disclose any contingency fee agreement that may exist.

Bowers further instructs that the contingency risk factor should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the case. Here, Boothe has refused to provide a copy of his fee agreement with Easterly, limiting the ability to determine precisely how much in attorney fees Boothe stands to recover. CP 408, 294. A contingency adjustment under such circumstances may further increase an already excess fee about which only Boothe is aware. Furthermore, the trial court already took into consideration the contingent nature of the fee in determining the lodestar. CP 501. Thus, no further adjustment should be made under *Bowers*.

Bowers also instructs that once fee recovery is assured, no contingency adjustment can apply. *Id*. On March 9, 2012, the County made an Offer of Judgment to Easterly in the amount of $40,001 that excluded reasonable attorney fees and gave Boothe the right to petition for and separately recover his attorney fees, thus ensuring his fee recovery. CP 344.

A contingency adjustment is also not warranted here because Boothe refused the County's attempts to settle this case. On numerous

occasions, the County sought to mediate Easterly's case in hopes of achieving a settlement. However, Boothe repeatedly undermined any possibility of mediation by demanding to know the County's "bottom line" before entering into mediation and insisting that any settlement reached must provide for his recovery of fees outside of the settlement. CP 287.

3. Alleged litigation challenges specific to Easterly's case do not warrant a fee multiplier.

Boothe seeks a multiplier because of the allegedly "protracted and bitter nature of the litigation." As noted above, the protracted nature of the litigation and resulting challenges were a result of Boothe's choice to bring Easterly's claims together with two co-plaintiffs whose claims were more complex and more susceptible to dismissal than his own. Boothe cannot properly elect himself into a fee enhancement.

Furthermore, a court should not award any enhancement based on legal risks or challenges peculiar to a case because "the lodestar is flexible enough to account for great variation in the nature of the work performed in, and the challenges presented by, different cases." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. at 734, 107 S. Ct. at 3091 (1987), citing *Hensley, supra*, at 434, 103 S.Ct., at 1940. The *Delaware Valley* Court further explained:

> "The novelty and complexity of the issues" raised in a case "presumably [would be] fully reflected in the number of billable hours recorded by counsel." The same can be said for most other problems posed by the litigation, such as the tenacity of the defendant. The "special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." Thus it is presumed that when counsel demonstrates considerable ability in overcoming unusual difficulties that have arisen in a case, counsel will be compensated for those accomplishments by means of an appropriate hourly rate multiplied by the hours expended. *Id*., quoting *Blum v. Stenson,* 465 U.S. 866, 898, 104 S.Ct. 1541, 1549, 79 L. Ed. 2d 891 (1984) (internal citations omitted).

The trial judge did not err in denying a multiplier because of the allegedly "protracted and bitter nature" of Easterly's case.

IV. CONCLUSION

The trial court properly exercised its discretion in determining Boothe's hourly rate as part of the lodestar, denying any fee multiplier and awarding Kesten Media's charges specified in its invoices as costs. The trial court adequately explained its reasoning and this Court should affirm the trial court's order awarding Easterly fees and costs.

RESPECTFULLY SUBMITTED this 31st day of July, 2017.

BULLARD LAW

By s/ Mitchell J. Cogen
Mitchell J. Cogen, WSBA No. 46364
Attorneys for Respondent Clark County

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, I electronically served the foregoing BRIEF OF RESPONDENT in Court of Appeals, Division II, Case No. 50297-6-II on the following parties:

Thomas S. Boothe
Attorney at Law
7635 SW Westmoor Way
Portland, OR 97225-2138
tsb@boothehouse.com

Philip Talmadge
Sidney Tribe
Talmadge/Fitzpatrick/Tribe
Third Floor, Suite C
2775 Harbor Avenue SW
Seattle, WA 98126
Phil@tal-fitzlaw.com
Sidney@tal-fitzlaw.com

Emily Sheldrick
Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
1300 Franklin Street, Suite 380
PO Box 5000
Vancouver, WA 98666-5000
Emily.Sheldrick@clark.wa.gov

Original eFiled with:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402

s/ Mitchell J. Cogen
Mitchell J. Cogen, WSBA No. 46364
Attorneys for Respondent Clark County

BULLARD LAW

July 31, 2017 - 4:17 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50297-6
Appellate Court Case Title:	Britt Easterly, Appellant v Clark County, Respondent
Superior Court Case Number:	09-2-05520-7

The following documents have been uploaded:

- 6-502976_Briefs_20170731161427D2744939_7539.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Brief of Respondent 00816824x9C8DD.PDF

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- emily.sheldrick@clark.wa.gov
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- sidney@tal-fitzlaw.com
- tsb@boothehouse.com

Comments:

Sender Name: Diane Cox - Email: dcox@bullardlaw.com
Filing on Behalf of: Mitchell J Cogen - Email: mcogen@bullardlaw.com (Alternate Email: dcox@bullardlaw.com)

Address:
200 SW Market St.
Suite 1900
Portland, WA, 97201
Phone: (503) 248-1134

Note: The Filing Id is 20170731161427D2744939